Supreme Court, U.S.
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No. 01-636

IN THE

Supreme Court of the United States

ARTHUR BEST and DEBRA BEST,

Petitioners,

v.

SEARS ROEBUCK AND CO., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENTS QUELLER & FISHER AND FRED QUELLER

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COUNTER STATEMENT OF FACTS

Plaintiffs-Petitioners Arthur Best and Debra Best (hereinafter, "Petitioners") combine two separate actions in their Petition for a Writ of Certiorari. The first action is a personal injury action against Respondents Sears Roebuck and Co. and others. The second action is a legal malpractice action against respondents Law Firm of Queller and Fisher and Fred Queller (hereinafter, "Queller & Fisher"). Each action is summarized below.

A. *Action Number One: The Personal Injury Action*

Petitioner Arthur Best was injured when he was struck by a flexible rod from a tool chest he was using. *See* Short Form Order dated March 24, 1999 of Hon. Bruce Alpert (annexed as "COPY O-9" to Petitioners' Petition for Writ of Certiorari) at page 3. He and his wife then retained Queller & Fisher to represent them in connection with a personal injury action against Sears Roebuck and others who were responsible for manufacturing, distributing or selling the tool chest which caused the injury. *See id.* at p. 4.

The personal injury action, brought in the Supreme Court of the State of New York, was eventually settled in open court for 1.75 million dollars. *See id.* at p. 6. Following the settlement, Petitioners attempted to have the settlement proceeds paid only to them, and not to Queller & Fisher. *See id.* at pp. 10-11. The attorneys for Sears filed a motion asking the court to direct them as to the manner of distribution of the settlement proceeds, and Queller & Fisher filed a cross-motion for an order directing the payment of its fee. *See id.* at pp. 1-3.

The presiding judge held that Queller & Fisher was entitled to its one-third fee in accordance with the parties' retention agreement. *See id.* at pp. 16-19. Petitioners filed a motion to reargue that determination, but the motion was denied. *See* Short Form Order dated August 5, 1999 of Hon. Bruce Alpert (annexed as "COPY O-8" to Petitioners' Petition for Writ of Certiorari).

Although Petitioners received their share of the settlement proceeds and discontinued the action against Sears and the other Respondents, they nevertheless appealed the order denying the motion to reargue. The Appellate Division dismissed the appeal, holding that no appeal lies from the denial of a motion to reargue. *See Best v. Sears Roebuck & Co.*, 278 A.D.2d 350, 718 N.Y.S.2d 610 (2d Dept. 2000).

Petitioners then filed a motion to reargue the Appellate Division's determination, or in the alternative, for leave to appeal to the Court of Appeals. *See Best v. Sears Roebuck*, No. 1999-10398 (2d Dept., March 14, 2001) (annexed as "COPY O-2A" to Petitioners' Petition for Writ of Certiorari). The motion was denied by the Appellate Division. *See id.*

B. ***Action Number Two: The Malpractice Action***

Petitioners also commenced an action against Queller & Fisher, asserting claims of legal malpractice, breach of contract, negligent misrepresentation, indemnification, fraudulent misrepresentation, fraudulent concealment of material facts, and punitive damages. *See* Short Form Order dated October 14, 1999 of Hon. Bruce Alpert (annexed as "COPY O-7" to Petitioners' Petition for Writ of Certiorari) at pages 4-5.

The action was dismissed on the grounds that the malpractice claim was barred because (1) the order from the underlying

personal injury action necessarily determined that there was no malpractice and (2) the remaining claims were merely redundant pleadings of the malpractice claim. *See id.* at pp. 5-6.

Petitioners appealed to the Appellate Division, which affirmed the order dismissing the action. *See Best v. Law Firm of Queller and Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2d Dept. 2000).

Petitioners filed a motion to reargue the Appellate Division's determination, or in the alternative, for leave to appeal to the Court of Appeals. *See Best v. Law Firm of Queller and Fisher*, No. 1999-10393 (2d Dept., March 14, 2001) (annexed as "COPY O-2" to Petitioners' Petition for Writ of Certiorari). That motion was also denied by the Appellate Division. *See id.*

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF WHICH PETITIONERS SEEK REVIEW WERE NOT RENDERED BY THE HIGHEST COURT OF THE STATE OF NEW YORK IN WHICH A DECISION COULD BE HAD, AND THEREFORE, THE COURT LACKS CERTIORARI JURISDICTION TO REVIEW THOSE DECISIONS

Section 3 of the Supreme Court Case Selections Act grants the Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had." *See* 28 U.S.C. § 1257(a) (West 1993). Since Petitioners did not exhaust their appellate remedies within the courts of the State of New York, the decisions and orders of which they seek review were not rendered by the highest court of New York in which a decision could be had.

In both the underlying personal injury action and malpractice action, Petitioners filed motions in the Appellate Division seeking leave to appeal to the New York Court of Appeals from the unfavorable Appellate Division orders.

Once the Appellate Division denied Petitioners leave to appeal to the Court of Appeals, Petitioners could have moved for leave to appeal in the Court of Appeals itself. Section 5602(a) of New York's Civil Practice Law and Rules ("CPLR") provides that "[a]n appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application." *See* CPLR § 5602(a) (McKinney 1995); *see also* Siegel, *New York Practice., Third Ed.*, § 528, at page 866 (West 1999).

Petitioners could also have taken an appeal as of right to the Court of Appeals. Section § 5601(b) of the CPLR provides as follows:

> An appeal may be taken to the court of appeals as of right: (1) from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and (2) from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

See CPLR § 5601(b) (McKinney 1995).

Since the Appellate Division orders which Petitioners challenge were not "rendered by the highest court of a state in which a decision could be had," *see* 28 U.S.C.A. § 1257(a), the Petitioners' petition for writ of certiorari should be dismissed for want of jurisdiction. *See Sandquist v. California*, 419 U.S. 1066, 95 S. Ct. 651, 42 L. Ed. 2d 662 (1974) [citing *Banks v. California*, 395 U.S. 708, 89 S. Ct. 1901, 23 L. Ed. 2d 653 (1969)].

The procedural history of the case at bar is similar to that of *Southern Electric Co. v. Stoddard*, 269 U.S. 186 (1925). In *Southern Electric*, the petitioner sought to challenge an order of the Appellate Division of the Supreme Court of the State of New York. *See id.* at 188. After losing in the Appellate Division, the petitioner made an application to the Appellate Division to certify a question of law to the Court of Appeals, but the Appellate Division declined to do so. *See id.* The petitioner did not thereafter file an appeal with the Court of Appeals or seek permission to appeal from the Court of Appeals. *See id.* at 189. The Court concluded that the petitioner "failed to make proper application to the state court of final resort," *see id.* at 190, and dismissed the writ of certiorari. *See id.*

The case at bar is also similar to *McMaster v. Gould*, 276 U.S. 284 (1928). In *McMaster*, the petitioners' action was dismissed by the trial court, and the dismissal was affirmed by the Appellate Division of the Supreme Court of the State of New York. *See id.* at 285. The petitioners then unsuccessfully moved the Appellate Division for leave to appeal to the Court of Appeals. *See id.* They did not, however, make the same motion in the Court of Appeals. *See id.* at 285-286. The Court held that "since the petitioners, when the Appellate Division refused their leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest

court of the State in which a decision could be had." *See id.* at 286-287 [citing *Newman v. Gates*, 204 U.S. 89, 95 (1907)]. The Court dismissed the writ of certiorari for want of jurisdiction. *See id.* at 287 .

It is respectfully submitted that the Court lacks jurisdiction over the instant matter for the same reasons it lacked jurisdiction in *Southern Electric* and *McMaster*.

II. PETITIONERS' PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT "AN IMPORTANT FEDERAL QUESTION" WHICH WOULD WARRANT THE COURT'S REVIEW.

Petitioners' appeal in the underlying personal injury action was dismissed because, under New York's procedural rules, "no appeal lies from an order denying reargument." *See Best v. Sears Roebuck & Co.*, 278 A.D.2d at 350, 718 N.Y.S.2d at 610. The state court did not address any substantive issues, let alone any important federal questions.

The appeal in the malpractice action also did not involve any important federal questions. In that appeal, the Appellate Division found that a prior finding that the attorneys were entitled to their agreed-upon legal fee "necessarily decided that there was no malpractice," thus precluding Petitioners' malpractice action. *See Best v. Law Firm of Queller and Fisher*, 278 A.D.2d at 441, 718 N.Y.S.2d at 397.

Rule 10 of the Rules of the Supreme Court of the United States provides a statement of the character of the reasons the Court will consider in deciding whether to grant a petition for a writ of certiorari. The non-exclusive list provided by the Court includes situations where "a state court of last resort has decided

an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals," and where a State Court "has decided an important question of federal law that has not been, but should be, settled by this Court." *See* U.S. Sup. Ct. R. 10 (emphasis added).

There is nothing in Petitioners' Petition for a Writ of Certiorari which suggests the presence of a "question of federal law" or "federal question," let alone an important federal question or important question of federal law. Under the circumstances, even if the Court possessed certiorari jurisdiction, it should decline to exercise such jurisdiction. *See Zucht v. King*, 260 U.S. 174, 176 (1922) ("[I]t is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not . . . substantial in character").

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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